DEFINING THE RIGHT OF SELF-DEFENSE:

Working Toward the Use of a Deadly Force Appendix to The Standing Rules of Engagement for The Department of Defense

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When we send fine young Americans into harm's way, we have a moral and legal obligation to provide them with Rules of Engagement (ROEs) that protect their right of self-defense. Our soldiers, sailors, airmen, and marines must expect ROEs that best ensure their safe return, to the maximum extent possible consistent with the mission parameters. Indeed, this is the stated policy of the Chairman of the Joint Chiefs of Staff's Standing Rules of Engagement (SROEs).[1] The SROEs are silent, however, concerning that ultimate and maximum exercise of self-defense—the use of deadly force. Simply stated, the SROEs fail to answer, clearly and unequivocally, the foremost question of those at the tip of the spear: "When can I pull the trigger?"

Silence at the strategic level regarding the use of deadly force level has resulted in the confusing and potentially life-threatening absence of operationally specific guidance at the tactical level.[2] As recently as March 25, 2001, the rules of engagement in place for soldiers serving in the peacekeeping action in Kosovo gave specious guidance on the use of deadly force that required them to "shoot to wound."[3] This order should not be surprising considering the restrictive guidelines given in Bosnia for NATO's Implementation Force (IFOR): "If you have to open fire, you must: Fire only aimed shots, and fire no more rounds than necessary and . . . stop firing as soon as the situation permits."[4] Further, warning shots were permitted, even encouraged, and the use of deadly force against assailants fleeing an attack was not even covered. These rules remained the same for the Peace Stabilization Force (SFOR), as well.[5] More disturbingly, many commanders have imposed "no rounds in the chamber" rules for perimeter security and patrols.[6]

It would be an understatement to say that confusion exists among commanders and judge advocates as to what constitutes a reasonable use of deadly force by U.S. forces and when that force is authorized.[7] It is no wonder that commanders are left with insufficient legal guidance and *ad hoc* methods for training their troops on when and how to use deadly force. The United States military forces, whose mission was once described as "to kill people and break things" has a 300-page regulation on the issuance of I.D. cards,[8] but lacks any specific guidance on the use of deadly force for its soldiers, sailors, airmen and marines on world-wide deployments.[9] After having examined some sources upon which to base that guidance, this article concludes with a proposed appendix to the SROEs on the use of deadly force as the benchmark mechanism with which to provide that specific guidance. In light of the recent terrorist activity in this country, the need for clear and robust guidance is essential.

International law, as well as the common law of the United States, provides ample support for the establishment

[1] CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (15 Jan. 2000) [hereinafter SROE]; *see also infra* note 19 and accompanying text.

[2] W. Hays Parks, *Deadly Force is Authorized*, U.S. NAVAL INST. PROC. (January 2001), at 34. ("Overly restrictive and unsuitable rules of engagement handicap and endanger U.S. forces, especially ground troops on peace-support missions. Individual marines, sailors, and soldiers need to know when they may resort to deadly force to protect their lives.").

[3] Thomas E. Ricks, *U.S. Military Police Embrace Kosovo* Role, WASH POST Mar. 25 2001, at A21 (quoting Staff Sergeant Jimmy Stogner about how the use of deadly force has been reduced to "'the five S's[:]' . . . '[s]hout, shove, show your weapon, shoot to wound, then shoot at the 'center of mass'").

[4] *See* OPERATIONAL LAW HANDBOOK, 2001 TJAGSA, Chapter 5, app. B, 102-03 (providing sample ROE cards).

[5] *Id*. at 104-05.

[6] U.S. ARMY COMMAND AND GENERAL STAFF COLLEGE, STUDENT TEXT 27-1: MILITARY LAW ¶ 3.3.III (1997), *available at* http://www-cgsc.army.mil/nrs/publications/STs/ST27-1_97/welcome_ST27-1.html (noting that the ROE required to be utilized and understood by all U.S. service members of a Multi-national Force stated that "[w]hen on post, mobile, or foot patrol, keep a loaded magazine in the weapon, weapons will be on safe with no rounds in the chamber").

[7] Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3, 53 (1994) ("Commanders wrestled with the question of whether and how to impose the most restrictive form of ROE: orders dictating which soldiers are armed and have live ammunition and when they may chamber rounds.").

[8] *See* AIR FORCE INSTRUCTION 36-2907.

[9] Parks, *supra* note 4, at 34. ("[T]he JCS SROE is a poor document for assisting an in-port ship commander or a ground force commander in informing individuals when they may use deadly force to protect themselves and others."); *see also supra* note 3 and accompanying text.

of vigorous guidelines concerning the use of deadly force. As discussed later in this article, every relevant legal system in the free world makes aggression a crime and protects the right of self-defense. This right is often referred to as an "inherent right" or a "divine right." Our own federal common law, as well as many latter-day constitutional law cases concerning this right, strongly defines and permits a rigorous force protection stance. Judge advocates and commanders crafting rules of engagement have ignored this rich source of law favorable to a vigorous defensive posture.

Incorporation of federal constitutional law and common law into the development of enhanced force protection and self-defense rules will only enhance our forces' ability to accomplish their missions. From humanitarian assistance to force-on-force conflicts, if potential opponents believe our forces vulnerable, the mission is compromised. Recurrent, hands-on tactical exercises that provide service members an opportunity to viscerally experience the psychological and physiological dynamics of tactical encounters recognized by the law is a critical requirement for effective training. Those so trained however, need clear and concise legal guidance demonstrating that both legal and political support is present if deadly force is used.

The Present SROE Use Of Deadly Force Policy

"The purpose of these SROE is to provide implementation guidance on the application of force for mission accomplishment and the exercise of the inherent right and obligation of self-defense."[10] So begins the unclassified Enclosure A to *Chairman of the Joint Chiefs of Staff Instruction* 3121.01A and yet, this purpose is not being served. The policy appearing on virtually every page of the SROE states that the Rules "do not limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate actions in self-defense of the commander's unit and other U.S. forces in the vicinity." The use of deadly force, however, is not accompanied by any implementation guidance. In fact, the words "use of deadly force" never appear in the SROEs, which begs the question—Is it any wonder that confusing, confounding and dangerous tactical rules of engagement (ROEs) exist? While cognizant of the fact that some of this confusion stems from improper training, without clear and unhindered rules, we may have fumbled before the kickoff.

The SROEs do provide some limited guidance on the use of force in general. It takes the form of a three-step process: When feasible give a warning; defend with proportionate force; and attack when it "is the only prudent means."[11] The first step, giving a warning when feasible, is one that is common to existing federal policies as appears below and ultimately appears in this article's proposed appendix. Similarly, the second step, proportionality, although arguably misplaced in a ROE document,[12] is a bedrock principle of self-defense under both domestic and international law. The third step, an attempt to define when the use of force is prudent, is the concern of this article and therefore will be examined in greater detail.

Again, the SROEs never actually address the use of deadly force. Instead, the third step is concerned only with limiting when to "attack to disable or destroy." Such an attack is permitted when it "is the only prudent means by which a hostile act or demonstration of hostile intent can be prevented or terminated." As the section on the existing Executive Branch policies regarding use of deadly force will discuss, this "last resort" notion permeates all policies on when to exercise self-defense. Moreover, as the probable root cause for "shoot to wound" and "no rounds chambered" policies seen at the tactical level, this "last resort" concept flies in the face of tactical realities and is inherently dangerous without a clearly defined use of deadly force policy. This unreasonably risky guidance should be eliminated from the SROE. Further, in the critical arena of self-defense, the SROE only concerns itself with "when" to attack to destroy, but not with "how," again leaving many commanders to focus on the last resort language.

Finally, regarding pursuit, the SROEs state that "[s]elf-defense includes the authority to pursue and engage hostile forces that continue to commit hostile acts or exhibit hostile intent."[13] The definition of a "hostile act" or "intent" is one that is drafted to cover U.S. forces only.[14] Compared with what is permissible under customary international law, the common law, and existing Department of Justice policies, this SROE language presents an unreasonable limitation on the use of deadly force in self-defense in pursuit situations against a "continuing threat." At a basic tactical level, it allows a group or individual that has recently demonstrated either a hostile act or intent to seek cover or a tactical advantage without fear of attack. An example of a recently demonstrated hostile act or intent occurred to an SFOR unit in

[10] SROE, *supra* note 2, encl. A, ¶ 1.a; *see also id*. ¶ 7 ("Enclosure A, minus appendices, is UNCLASSIFIED and intended to be used as a coordination tool with US allies for the development of combined or multinational ROE consistent with these SROE.").
[11] SROE, *supra* note 2, encl. A, ¶ 8.a.

[12] Parks, *supra* note 3, at 36. ("'Minimum deadly force' is an oxymoron, as is 'proportionate deadly force.'").
[13] SROE, *supra* note 2, encl. A, ¶ 8.b. As defined at 5.i., a hostile force is one that has "committed a hostile act, exhibited hostile intent, or has been declared hostile by appropriate US authority." *Id.* ¶ 5.i. This use of "hostile force" is confounding in that once a force is declared hostile, as per paragraph 6, "US units need not observe a hostile act or a demonstration of hostile, [sic] intent before engaging that force." *Id*. ¶ 6. The repeated use of the term "hostile force" adds to the confusion in the definition. Specifically, if a force is declared hostile, it is always a target. *Id*. Moreover, the notion of pursuit is not limited by a hostile force's demonstration of a hostile act or intent. *Id*. ¶ 5.i. The SROE also makes any force that demonstrates a hostile act or intent an undeclared hostile force. *Id*. This distinction of hostile force by actions, and hostile force by declaration is unnecessarily confusing and frustrates the purpose of the SROE of serving as guidance and training. This terminology should be changed to clear up any potential confusion. "Hostile force" should be reserved for declared hostile forces and all other forces who demonstrate hostile act or intent should be addressed precisely that way, as a force who demonstrates hostile act or intent.
[14] *Id*. ¶ 5.g-h. There are provisions for extending the right of self-defense beyond U.S. forces to include U.S. nationals, U.S. property, and even foreign nationals, but each of these decisions are specific to the theater or mission, whereas the protection of U.S. forces may not be altered. *Id.* ¶ 8.c(1-5).

Mostar, Bosnia. in early 1997.[15] At a checkpoint, individuals in a car fired two rocket-propelled grenades at a Spanish armored personnel carrier. The hostile actors then fled the scene by driving down a straight, unoccupied road. Despite having a clear shot with their .50 caliber machine gun, the Spanish unit did not fire because they thought the rules of engagement would no longer characterize the subjects as a threat.

Nevertheless, the SROEs do provide some very fundamental guidance on self-defense. Some claim that by providing only basic information, the SROEs allow for the mission-specific tailoring of rules for each mission. Despite the simplicity and generic nature of the SROEs, they are often the only promulgated rules of engagement for deployed forces, with very little mission-specific tailoring at the subordinate level as to how and when to apply force in self-defense.[16] As eloquently stated by Lieutenant Colonel Mark S. Martins, much of this problem has to do with proper leadership and training.[17] However, the failure of the SROEs to squarely address the use of deadly force in self-defense can lead to conflicting and dangerous restrictions on this inherent right. Moreover, it places an onus on commanders without the proper legal guidance by which to operate.

The charge is put to commanders under the SROEs that they "have the obligation to ensure that individuals within their respective units understand and are trained on when and how to use force in self-defense." As demonstrated by the confusion at the tactical level, this obligation is not being met. An appendix to the SROEs codifying the inherent right of self-defense would help end this confusion and enable our commanders to ensure that their troops retain their inherent right to self-defense, instead of issuing specific ROE that unnecessarily abridge that inherent right. Perhaps more importantly, clear and supportive guidance would give junior enlisted American military personnel—those who actually have to apply deadly force—the critical tools necessary to do that job correctly and protect themselves from the potential adverse consequences associated with an improper use of deadly force. The following are sources for such an appendix:

SOURCES OF LAW

International Recognition of the Inherent Right to Self-Defense. The most relevant and recognized view of self-defense in international law resides in Article 51 of the United Nations Charter,[18] which states that "[n]othing in the present Charter shall impair the *inherent right* of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." It is important to note that Article 51 does not create the right of self-defense in international law. Rather, it codifies a pre-existing and more universal right.

Historically, the right of self-defense has been viewed as a divine right in international law.[19] The right of self-defense in criminal law is one deeply rooted in the legal traditions of England, the source of most American common law. Almost a half millennium ago, the right of self-defense was expressed in the statutes of King Henry VIII,[20] as a complete defense to civil and criminal prosecutions. The inherent nature of the right of self-defense was also addressed in *Blackstone's Commentaries on the Laws of England*,[21] as such, "[s]elf-defense . . . is justly called the primary law of nature, so it is not, neither can it be . . . taken away by the law of society." Thus, the SROEs are entirely correct in proclaiming the right of self-defense as an inherent right.

Customary international law recognizes this right as well. The application of anticipatory or pre-emptive self-defense and the maxim of a person's inherent right to self-defense were firmly established in the *Caroline* incident. In 1837, the British were fighting a counter-insurgency war along the Niagara River in Canada. The steamer *Caroline* was being used by the insurgents on both the American and British sides of the river. On the evening of December 29, 1837, British combatants crossed onto the American side of the river and destroyed the Caroline while it was docked in Schlosser, New York. The Americans protested, but the British responded that they were merely exercising their inherent right of self-defense. American Secretary of State Daniel Webster agreed. This incident is a widely cited authority dealing with anticipatory self-defense, and holds that states may resort to force even when not actually under attack if there is "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[22] Secondly, to be appropriate, self-defense must be proportional, not "unreasonable or excessive."[23]

Some prominent Judge Advocates consider the *Caroline* incident an important milestone in the recognition of the common law right of self-defense as it relates to international law.[24] Lieutenant Commander Dale Stephens wrote:

> The '*Caroline*' correspondence indicates, however, that the authors themselves drew upon natural law concepts and combined them with municipal notions of self defense as then understood in Anglo-American criminal law. In this regard, the authors were acknowledging the personal and instinctive nature of self defense. Lord Ashburton plainly stated in his response to Mr. Webster of 28 July 1842, that self defense "is

[15] Interview with Lieutenant Colonel John Taylor, USA, in Fort Bragg, North Carolina, May 17, 2001 (noting that these facts were based on co-author Lieutenant Colonel Taylor's firsthand account at SFOR).
[16] Parks, *supra* note 3, at 35. ("By and large, ROEs produced by the most lawyer-heavy military in the world are cut-and-paste, copycat products lacking original thought or analysis and unsuitable for current missions.").
[17] Martins, *supra* note 41, at 16.
[18] U.N. CHARTER art. 51.
[19] Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (a Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 31-32 (1987). See also, 30 Corpus Juris Homicide 207 (1923)
[20] 24 Hen. 8, ch.5 (1532) (Eng.).
[21] 3 WILLIAM BLACKSTONE, COMMENTARIES * 1.
[22] 29 BRITISH & FOREIGN STATE PAPERS 1129, 1138 (1840-41) (quoting Daniel Webster, concerning the *Caroline* incident).
[23] *Id*.
[24] Lieutenant Commander Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126, 134 (1998).

> the first law of our nature, and it must be recognized by every code which professes to regulate the conditions and relations of man." Further, Lord Ashburton was plainly aware of the novel nature of the American proposition that international actions may be justified by a combination of the established principle of necessity and the national legal concept of self defense. Lord Ashburton specifically noted the 'ingenious' suggestion by Mr. Webster that the legitimacy of British actions should be assessed by reference to this modified concept of self defense under international law. Thus, the British suddenly found themselves defending their Captain's actions on the basis of a principle narrower than self-preservation. Further, Lord Ashburton accepted the challenge and consistently described his justification of British actions in terms analogous to personal self defense.

Thus, international law has long recognized the right of nations to engage in acts–even anticipatory acts–of self-defense. A military unit, as an extension or arm of sovereign power, has this right. This long recognized right of self-defense is also strongly enunciated in our common law.

American Common Law. The inherent right of self-defense has been a tenet of american law since its beginning,[25] and it has been perpetuated throughout the case law history. Regarding American citizens not in the employ of any police enforcement activity, *New Orleans & Northeastern Railroad Co. v. Jopes*,[26] stood for the idea that "the rules which determine what is self-defence [sic] are of universal application, and are not [diminished] by the character of the employment in which the [shooter] is engaged." Further, the common law did not call upon a man to flee rather than fight to defend himself, as illustrated in the case of *Beard v. United States*.[27] In *Beard*, the court stated:

> [I]f the accused . . . had at the time reasonable grounds to believe and in good faith believed, that the deceased intended to take his life or do him great bodily harm, *he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground* and meet any attack made upon him with a deadly weapon, in such a way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury.

The right or privilege of self-defense also belongs to federal agents, not only civilian criminal defendants. This right exists for federal agents, because it is necessary for them to protect themselves *so they can accomplish their missions*.[28] As said in *Maryland v. Soper*:[29] "Such acts of defense are really part of the exercise of [an Agent's] official authority. They are necessary to make the enforcement effective." Similarly, U.S. military forces abroad are not only unreasonably put in jeopardy, but are unnecessarily hamstrung in accomplishing their missions if not allowed to adequately defend themselves.

Common law does not require one to delay in considering non-lethal responses to an immediate threat of deadly force. Nor is one required to shoot to wound or give warning. In light of the clarity of the law of self-defense on this point, it is astounding that many judge advocates write into operational unit ROE, or incorporate into training requirements, that service members must consider or exhaust lesser alternatives when confronted with deadly force.[30] The words of the United States Supreme Court in *Brown v. United States*,[31] are particularly persuasive on this point:

> Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant[, or to consider other alternatives,] rather than to kill him.[32]

This leaves one to wonder why many commanders and judge advocates expect detached reflection when soldiers are confronted with an upraised AK-47. Or a hostile rabble armed with clubs.

Lastly, concerning the use of deadly force, the Supreme Court has levied its judgment on the criteria for analyzing an officer's decision to use deadly force. In *Graham v. Connor*,[33] utilizing a Fourth Amendment analysis[34], the Court

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[25] *See* U.S. CONST. amend II; *see also* Ronald S. Resnick, *Private Arms as the Palladium of Liberty: The Meaning of the Second Amendment*, 77 U. Det. Mercy L. Rev. 1, 14 n.27 (1999) (citing several of the Founding Fathers for their view that the Second Amendment stands for the right to private self-defense).

[26] 142 U.S. 18 (1891) (noting that the plaintiff, a passenger on the train, was shot and injured when he approached and threatened the conductor by wielding an open knife).

[27] 158 U.S. 550, 563-64 (1895) (noting that the plaintiff's land was trespassed by three armed men who sought to steal a cow and take plaintiff's life, and in an attempt to protect himself, the plaintiff struck one man across his head with his rifle, causing a mortal wound).

[28] *See, e.g.,., In re* Neagle, 135 U.S. 1, 72 (1890); Reed v. Madden, 87 F.2d 846, 852 (8th Cir. 1937); West Virginia v. Laing, 133 F. 887, 891-92 (4th Cir. 1904); Kelly v. Georgia, 68 F. 652 (S.D. Ga. 1895); Ramsey v. Jailer, 20 F. Cas. 214 (D. Ky. 1879); Roberts v. Jailer, 26 F. Cas. 571, 576 (D. Ky. 1867).

[29] 270 U.S. 9 (1926) (noting that this case concerned a petition for a writ of mandamus to remand an indictment for the murder of four probation agents).

[30] MARINE CORPS ASSOCIATION, GUIDEBOOK FOR MARINES 74-75 (17th ed. 1997) ("Application of deadly force is justified only under conditions of extreme necessity and only as a last resort when all lesser means have failed or cannot reasonably be employed.").

[31] 256 U.S. 335 (1921) (noting that defendant shot and killed assailant, who had repeatedly struck defendant with a knife).

[32] *Id.* at 343; *see also* Silas v. Bowen, 277 F. Supp. 314, 318 (D. S.C. 1967) (stating that use of deadly weapon as self-defense is justified if a reasonable person would anticipate serious bodily harm); United States v. Peterson, 483 F.2d 1222, 1236 (D.C. App. 1973) (recognizing that there is no duty to retreat from an assault producing imminent danger); Glashen v. Godshall, 1999 U.S. Dist. LEXIS 17698, *6 (S.D.N.Y. Nov. 16, 1999); Marche' v. Parrachak, 2000 U.S. Dist. LEXIS 14804, *13 (E.D. Pa. Oct. 10, 2000); United States v. Yabut, 43 C.M.R. 233, 234 (CMA 1971).

[33] 490 U.S. 386 (1989) (noting that police officers violently arrested the plaintiff, not knowing that plaintiff was suffering a diabetic attack).

[34] A Fourth Amendment analysis is utilized because the Court is looking at the overall appropriateness of the law enforcement seizure rather than self-defense only.

ruled that "[t]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Further, the Court stated:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

Some advocates may assert that the common law, as well as latter-day Fourth Amendment cases, has no relevance to the analysis of the use of deadly force in the military.[35] However, the common law already has relevance in the application of the Uniform Code of Military Justice. In fact, the instructions found in Department of the Army Pamphlet 27-9, *The Military Judge's Benchbook*, concerning the use of deadly force in self-defense, mirror the common law.[36]

Existing Policy in the Executive Branch. On October 16, 1995 the Departments of Justice and Treasury issued new policies on the use of deadly force. Revelations from the congressional hearings on the Ruby Ridge shootings, where federal agents were under special orders that snipers "could and should" fire at any armed adult male spotted outside Randy Weaver's cabin, spurred the new policy. The policy brought under its purview the Federal Bureau of Investigation (FBI), the U.S. Marshals Service, the Bureau of Prisons, the Bureau of Alcohol, Tobacco and Firearms, the Drug Enforcement Administration, the Secret Service and the Customs Service, and remains in effect today. Considering the often analogous situation between federal agents and service members conducting peace enforcement, peace keeping, humanitarian intervention, and non-combatant evacuation operations, the rules under which the other federal officers operate, while not binding, certainly offer one source from which to craft a use-of-deadly-force appendix to the SROE.

Unfortunately, the DoD has ignored both federal common law and constitutional decisions concerning the use of deadly force in its development of the SROE and tactical ROE. Meanwhile, the Department of Justice (DOJ) Commentary to their deadly force policy *expressly* acknowledges such case law in developing policy for officers.[37] Indeed, the DOJ states in the introduction to the commentary that, "[i]n developing the policy, it became apparent that decisional law provides only limited guidance regarding the use of deadly force. In addition, as a matter of principle, the Department deliberately did not formulate this policy to authorize force up to constitutional or other legal limits."[38] The DOJ has therefore opted for a more restrictive authority based on its judgment of what a prudent policy should instruct.

The commentary to the policy establishes that "the touchstone of the Department's policy regarding the use of deadly force is necessity." As the policy, commentary, and the FBI's Training Guide to the Deadly Force Policy explain, the necessity to use deadly force hinges on two factors: (1) "[t]he presence of an imminent danger" of death or serious physical injury to the agents or others, and (2) no safe alternative to using such force exist.[39] The criteria for evaluating an officer's judgment of what constitutes necessity is based explicitly on *Graham v. Connor*, which is common to the policies of DoD law enforcement agencies as well.

There may be situations in which a soldier, sailor, airman, or marine may be constrained by policy not to fire on an otherwise dangerous subject.[40] Such situations, however, should be the tactical exception rather than the rule, and should be solely within the unfettered purview of leaders at the absolute lowest levels. Moreover, the constraining policy imposed should not result in an unnecessary risk to the service member. This is not, as some suggest, a usurpation of military authority.[41] It should be remembered that military leaders have the authority to order subordinates to "take that hill," but not the right to order them to charge with fixed bayonets when machine guns are available.

Safe alternatives are considered when determining whether deadly force should be utilized, and the DOJ has outlined their parameters very clearly. Unlike the mandatory "*Stani Ili Pucam!*" (Stop or I will fire), in the IFOR and SFOR ROEs, verbal warnings are not required where they would pose a risk to the officer or others. Yet another concern is the availability of cover: deadly force may still be necessary where the felon can find or is seeking tactical cover. A dangerous individual can represent a continuing

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[35] Parks, *supra* note 3, at 35. ("Military and DoD civilian lawyers have eschewed federal case law relating to law enforcement use of deadly force because of the natural (and correct) reluctance to involve the military in domestic law enforcement, failing to distinguish between applying it and using its resources for assistance.").

[36] DEPARTMENT OF THE ARMY, PAMPHLET 27-9, MILITARY JUDGE'S BENCHBOOK, 5-2-1, *et seq* (stating that there must be "a reasonable belief that death or grievous bodily harm was about to be inflicted . . .").

[37] U.S. DEP'T OF JUSTICE COMMENTARY REGARDING THE USE OF DEADLY FORCE IN NON-CUSTODIAL SITUATIONS, fn. 1 (Oct. 17, 1995).

[38] *Id*. (footnotes omitted). The commentary continues:

> Courts would step outside their proper role if they formulated detailed policies with respect to the procedures governing deadly force; in contrast, the Department has the discretion to determine what the policy should be and to provide guidance to its employees with regard to these solemn issues. Cases arise in procedural postures—typically civil tort or civil rights actions, or motions to dismiss or overturn criminal charges or convictions—in which a wrongful act on the part of the government may not lead to recovery or sanctions. As a result the court often does not reach the question of whether the use of force was wrongful.

[39] *See* JOHN C. HALL, FBI TRAINING ON THE NEW FEDERAL DEADLY FORCE POLICY ¶ III.B (April 1996) (noting that Mr. Hall, who teaches in the FBI Academy's Legal Instruction Unit, is regarded as a leading expert on the law relating to deadly force).

[40] e.g., if an armed subject is hiding among a crowd of unarmed non-combatants, or if to return fire would provoke a more dangerous response. Just as in civilian law enforcement settings, the authority to fire does not mean a service member *must* fire.

[41] Public discussion generated at the XVIII Airborne Corps' Joint Rules of Engagement Conference, Fort Bragg, North Carolina, May 17-18, 2001.

threat, despite the seemingly non-threatening actions of a subject fleeing the scene.

The DOJ policy boldly prohibits two commonly, but improperly, accepted alternatives: warning shots and shooting to wound. The policy states that "[w]arning shots are not permitted outside of the prison context." As the commentary explains, "[d]ischarge of a firearm is usually considered to be permissible only under the same circumstances when deadly force may be used-that is, only when necessary to prevent loss of life or serious physical injury. Warning shots themselves may pose dangers to the officer or others." As for the propriety of shooting to disable or shooting to wound, the commentary flatly bans such a practice: "[a]ttempts to shoot to wound or to injure are unrealistic and, because of high miss rates and poor stopping effectiveness, can prove dangerous for the officer and others. Therefore, shooting merely to disable is strongly discouraged." Although federal law enforcement agencies have already recognized and banned the practice of shooting to wound, this ineffective and dangerous practice is perpetuated by the orders given to our troops in the Balkans. More disturbing, are rules requiring servicemen deployed in hostile fire or hazardous duty zones to patrol with unloaded side arms. This practice flows from commanders' misunderstanding of the level of force allowed by the law, inadequate training, and an irrational fear that shooting someone, even if justified, will somehow lead to a perception of mission failure.

Once an individual has made the decision to open fire, the next question is for how long can he continue to fire. Again, in contrast to IFOR and SFOR ROEs, a federal agent is not required to shoot once and then stop. Instead, he is to continue firing until the subject surrenders or no longer poses an imminent threat. This determination, rather than the number of rounds fired, is a more accurate measure of proportionality. Further, under the stressful conditions of a deadly force encounter, it is unrealistic and tactically unsound to require the counting of rounds.

Use of Deadly Force According to DoD. Somewhat surprisingly, a DoD policy does exist on the use of deadly force. Unfortunately, it only relates to the performance of law enforcement and related security duties rather than to ROEs for the force as a whole. Originating in 1992, it evolved in 1997, and matured to its most recent version as of November 2001: *Department of Defense Directive 5210.56, Use of Deadly Force and the Carrying of Firearms by DoD Personnel Engaged in Law Enforcement and Security Duties*.

This Directive authorizes DoD personnel to carry firearms while engaged in law enforcement or security duties; while protecting personnel or vital government assets;, or guarding prisoners. The recent changes to this Directive, in the wake of September 11, 2001, set forth rules for armed travel aboard commercial aircraft. To its credit, the new policy attempts to better comport with DOJ Deadly Force Policy, as well as specifically barring the use of warning shots. Unfortunately, the new DODD 5210.56 retains some confusing language concerning what constitutes "serious bodily harm." Serious bodily harm is "not . . . a black eye or a bloody nose, but [it] does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to the internal organs, and other life-threatening injuries."[42] While attempting to illustrate what constitutes "necessity," such language may actually place DoD law enforcement personnel in danger by giving them the mistaken belief that they must first suffer less than "serious physical harm" before resorting to the use of deadly force against an otherwise dangerous subject.

In a tactical military setting, this issue becomes more apparent. Anyone who attacks an openly armed soldier becomes a *de facto* and *de jure* threat, and deadly force is authorized. A physical attack against an armed service member in which that service member's weapon may be taken by the attacker and used with deadly effect against either the service member or his/her fellow service members is, in effect, a use of deadly force. One refusing to recognize this fact is either uneducable or silently stating that the assailant's life is more important than the uniformed service member's life.

There are many other activities, such as manning traffic control points or guarding a ship in port, when the carrying of loaded side arms would be prudent and warranted. Usually, this would occur in a deployed environment. Therein lies the impotence and irrelevance of DODD 5210.56, for it does not apply, "to DoD personnel engaged in military operations and subject to authorized rules of engagement."[43] It is precisely in such situations where most DoD personnel will need such guidance and where such guidance is lacking.

Lastly, among judge advocates and commanders, there is great confusion over what "use proportionate force" means. DODD 5210.56 adds to this confusion by stating that "[i]n such cases where the use of force is warranted, DoD personnel shall use the *minimum* amount of force necessary to reach their objective." The requirement to use "minimum force" does not appear in the SROE. Further, the Law of Armed Conflict (or the Law of War) only requires proportional force to be used. Yet troops are regularly briefed that this is how they are to defend themselves-not with *proportionate* force, not to eliminate the threat, but with *minimum* force. In addition to the political pressures for no conflict or casualties, this language is briefed perhaps due to commanders' or judge advocates' underestimation of troops' capacity to appreciate proportionality. In other words, troops are briefed to use "minimum force" in self-defense as a shorthand measure in an effort to preclude "excessive force." However, as Colonel (Ret.) W. Hays Parks has quite accurately, proclaimed: "Minimum deadly force is an oxymoron."[44] The proposed appendix seeks to eradicate this potentially life-threatening advice for troops operating under the SROE.

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[42] *Id*. This is the same language found in the Manual for Courts-Martial (2000), paragraph 54.c.(4)(a), for its definition of grievous bodily harm.
[43] DODD 5210.56. ¶ 2.3.
[44] Parks, *supra* note 3, at 36.

APPENDIX D TO ENCLOSURE A
SELF-DEFENSE POLICY AND PROCEDURES ON THE USE OF DEADLY FORCE

1. Purpose and Scope

a. This appendix establishes policies and procedures and provides SROE (additional to those in Enclosure A) governing the use of deadly force by US forces to defend the United States, US forces, US nationals and their property, US commercial assets, and designated non-US forces against a hostile act or demonstrated hostile intent. To provide uniform training and planning capabilities, this document is authorized for distribution to commanders at all levels and is to be used as fundamental guidance for training and directing their forces.

b. Except as augmented by supplemental ROE for specific operations, missions, or projects, the policies and procedures established herein remain in effect until rescinded.

c. U.S. forces operating with multinational forces: U.S. forces always retain the right to use necessary and proportional force, including the use of deadly force, for unit and individual self-defense in response to a hostile act or demonstrated hostile intent.

d. Commanders of U.S. forces subject to international agreements governing their presence in foreign countries (e.g.,. Status of Forces Agreements) retain the inherent authority and obligation to use all necessary means available and take all appropriate actions, including the use of deadly force, for unit self-defense.

e. U.S. forces in support of operations not under OPCON or TACON of a U.S. CINC or that are performing missions under direct control of the NCA, Military Departments, or other-USG departments or agencies (e.g.,. Marine Security Guards, certain special security forces) retain the authority and obligation to use all necessary means available and to take all appropriate actions, including the use of deadly force, in unit self-defense in accordance with this appendix to these SROE.

f. DoD units operating under USCG OPCON or TACON retain the authority and obligation to use all necessary means available and to take all appropriate actions, including the use of deadly force, in unit self-defense in accordance with this appendix to these SROE.

2. Policy**. As established in Enclosure A and this appendix, these rules do not limit a commander's inherent authority and obligation to use all necessary means and to take all appropriate actions, including the use of deadly force, in self-defense of the commander's unit and other U.S. forces in the vicinity.**

3. Definitions

a. Deadly Force. The use of any force that a person knows or should know would create a substantial risk of causing death or serious bodily harm.

b. Reasonable Belief. Facts and circumstances, including the reasonable inferences drawn therefrom, known to the person at the time of the use of deadly force, that would cause a reasonable person to conclude that probable cause exists to take immediate action . The reasonableness of a belief or decision must be viewed from the perspective of the person on the scene, who may often be forced to make split-second decision in circumstances that are tense, unpredictable, and rapidly evolving. Reasonableness is not to be viewed from the calm vantage point of hindsight.

c. Imminent. Involving a period of time dependent on the circumstances of an individual situation, rather than the fixed point of time implicit in the concept of "immediate" or "instantaneous." Thus, a subject may pose an imminent danger even if he or she is not, at that very moment, pointing a weapon at an U.S. unit or service member. For example, if a subject who has demonstrated a hostile act or intent has a weapon within reach, or is running for cover carrying a weapon, or is running to a place where the U.S. service member has reason to believe a weapon is available, that subject may pose an imminent threat.

4. Authority to Use Deadly Force. Deadly force may be employed under one or more of these circumstances:

a. Self-defense and Defense of Others. Individuals may use deadly force, when the individual reasonably believes himself or other U.S. personnel, units, or friendly forces in the vicinity to be in imminent danger of death or serious physical harm.

b. Assets Involving National Security. When it appears reasonably necessary to prevent the actual theft or sabotage of assets vital to national security. DoD assets shall be specifically designated as "vital to national security" only when their loss, damage or compromise would seriously jeopardize the fulfillment of a national defense mission. Examples include nuclear weapons; nuclear command, control, and communications facilities; and designated restricted areas containing strategic operational assets, sensitive codes, or special access programs.

c. Assets Not Involving National Security But Inherently Dangerous to Others. When deadly force reasonably appears to be necessary to prevent the actual theft or sabotage of resources, such as operable weapons or ammunition, that are inherently dangerous to others; i.e., assets that, in the hands of an unauthorized individual, present a substantial threat of death or serious physical harm to others. Examples include high-risk portable and lethal missiles, rockets, arms, including individual or crew served small arms, ammunition, explosives, chemical agents, and special nuclear material.

5. Action in Use of Deadly Force

a. Means of Self-Defense. All necessary means available and all appropriate actions may be used when employing deadly force for self-defense. The following apply for individual, unit, national, or collective self-defense:

1) Verbal Warning. If feasible and if doing so would not increase the danger to the individual or U.S. personnel, units or other friendly forces in the vicinity, give a verbal warning prior to the use of deadly force. Failure to heed a verbal warning may be considered as a threat indicator.

2) Warning Shots. General Rule: Warning shots *by ground forces* are prohibited. Exception: A ground commander, at any level of command, may, on a case-by-case basis, order the use of warning shots if such use does not place members of his command at greater risk of death or serious physical harm, and to do so would not place innocent bystanders, at greater risk of death or serious physical harm

3) Discharge of a Firearm. When a firearm is discharged, it will be fired with the intent of rendering the individual or group posing a threat of death or serious physical harm incapable of continuing to do so. In other words the intent will be to stop the conduct that poses a threat of death or serious physical injury. Orders to "shoot to wound," or words to that effect, are prohibited.

b. Pursuit of Hostile Forces. Pursuit and use of deadly force is authorized when it reasonably appears necessary to detain or prevent the escape of a person who is believed to have posed an imminent threat of death or serious physical injury to U.S. personnel, units, or other friendly forces in the vicinity (as defined in para 4a), stolen or attempted to steal National Security Assets (as defined in para 4b), or stolen or attempted to steal assets inherently dangerous to others (as defined in para 4c), and it reasonably appears that the individual poses an imminent or continuing threat of death or serious physical injury to U.S. personnel, units, or other friendly forces in the vicinity.

Proposed
Use-Of-Deadly-Force Appendix To The SROE

While this proposed appendix has its roots in the U.S. Constitution and American common law, it is also consistent with customary international law and the underpinnings of the UN Charter. Both the DOJ Deadly Force Policy and DODD 5210.56 are similarly based on federal case law. Since it is the Constitution of the United States to which servicemen take an oath of allegiance, such roots are not misplaced.

The trigger for the use of deadly force is necessity. The legal criterion by which the service member's decision to open fire will be evaluated is that of "objective reasonableness" as explained by *Graham v. Connor*.

The term "imminent" retains the elastic definition found in the commentary to the DOJ policy. It includes the situation where the individual suspected of threatening or in fact inflicting serious bodily harm remains a valid target for self-defense if he is heading for cover or where a weapon may reasonably be available to him.

The requirement of a verbal warning is maintained at the "feasible" level: One is only required if it does not endanger the service member or others. Further, the evaluation of the assailant's reaction as discussed in the FBI's Training Guide is also adopted: compliance, and no shot is allowed; resistance or ignoring the warning, and shots are still authorized. This concept of allowing for a verbal warning must remain in proper perspective. It should not be a requirement, but only a desirable attempt, if feasible. The IFOR/SFOR ROE requirement to warn in the host nation's languages would be altered to include the words "if feasible." The absurdity of making verbal warnings a requirement—speaking a foreign language clearly enough to be understood in a high stress and noisy environment—merely increases the exposure of our young service members to more Monday morning quarterbacking.

Hopefully, the confusion on warning shots and "shoot to wound" will be put to rest by the Appendix since both are expressly prohibited for most ground force applications. As the case law, DOJ policy, and DODD 5210.56 all recognize, these practices violate the governing principle of the SROE, to wit: Commanders should not diminish their troops' right of self-defense. Tactical and law enforcement experience has shown that these practices only serve to endanger officers and service members, and they should rightly be banned. The Appendix also addresses these issues.

During the past decade, the U.S. military has changed its mission from one of "killing people and breaking things" to "healing people and building things, but be prepared to kill people and break things, too." Prior to September 11, 2001, these recent missions caused uncertainty among commanders as to what levels of force may be used in self-defense. Now, new and clarified rules are required. If and when forces are declared hostile, there is no concern for when a serviceman fires, how long or how often he fires, so long as it is directed at the enemy. But in today's world, the "enemy" is not such a clear-cut target. Instead, our troops are deployed on counter-terrorist, peacekeeping, humanitarian aid, and security assistance missions. What decisions are we to expect of our service members when no armed conflict exists, yet they are threatened and attacked by hostile host nationals either pointing firearms or attacking with clubs? Our troops need proper guidance and training so that they are not further endangered by the SROEs and their progeny found in tactical ROE and ROE cards. The Use of Deadly Force Appendix proposed by this article provides that guidance. It will clear up the confusion, give commanders the political support they deserve, and protect our troops' right of self-defense.

When confronted with the proposal of adding a deadly force policy to our SROEs that is similar to the DOJ policy, many have voiced a concern that this will impair our warfighting capability by causing young troops to hesitate when ordered to fire at a declared combatant in a traditional force on force environment. This argument is without merit for two reasons: First, it assumes that personnel are incapable of following orders to switch from one rule to another (an assumption belied by both practical experience and the routine use of phased ROEs in battle planning). Secondly, the alternative as it now stands—commanders prohibiting individuals to lock and load magazines for fear of unintended discharges or, as happens throughout the SFOR theater, sending Army CID personnel to investigate every discharge of a firearm—in no way can be viewed as inculcating a warrior mentality.

The authors recognize the inherent tension that exists between operators and policy makers. Too often, just as in law enforcement bureaucracies, policy makers are more concerned about liability and not enough about survivability. Uniformed judge advocates, however, should concern themselves with enhancing our commands' survivability within the parameters of the law.

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